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February 2, 2005

VIA ELECTRONIC FILING

Marlene R. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 99-68, 96-98
Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92

Dear Ms. Dortch:

I am writing on behalf of Focal Communications Corporation in connection with the Commission's consideration of an order addressing intercarrier compensation for ISP-bound calls.

Given recent actions by RBOCs to eviscerate the FCC's *ISP Remand Order,* it is imperative that the Commission reaffirm its prior decision that termination of ISP-bound calls be compensated at the FCC set ISP-bound traffic rate -- regardless of how the service is provisioned -- and that the Commission do so in the item set for release next week. Already, RBOCs are engaging in self-help and ignoring the Commission's holding in its *ISP Remand Order*. Qwest has thrown down the gauntlet with CLECs by recently informing them that Qwest will no longer pay intercarrier compensation on any VNXX traffic, including ISP-bound traffic.[1] Absent an unequivocal statement from the Commission next week that such traffic is subject to compensation, it appears that Qwest will continue to flaunt its existing legal obligation and deny CLECs the compensation to which they are entitled. The Commission should take this opportunity to put Qwest in its place and address this issue in next week's order.

In their most recent *ex parte* filings, Qwest and Verizon continue their nearly nine-year-old battle against the Telecom Act's requirement that competing local exchange carriers pay reciprocal compensation for the transport and termination of traffic. We need not repeat the history of this issue at the FCC other than to note that the FCC eventually preempted the States,

[1] *See* Letter to Daniel Melazis from Steve Hanson, Vice President Carrier Relations (Jan. 27, 2005) attached at **TAB 1**.

declaring calls to ISPs to be interstate, and established a special low rate for the termination of calls to ISPs.[2] Compared to the current national average reciprocal compensation rate of approximately $0.0025 for local calls,[3] rates for calls to ISPs bottomed out at $0.0007. Not satisfied with this result, Qwest and Verizon now claim that most calls to ISPs should not receive the ISP rate because they are provided using VNXX services. This method of provisioning services to ISPs is not a new development -- in fact, this issue has been litigated and most states have determined that the Commission's *ISP Remand Order* governed;[4] rather, it is simply a new excuse RBOCs are testing to avoid payment of any amount to CLECs for their provision of terminating services for calls made to ISPs from RBOC customers.

Once again, the cry of "arbitrage!" is heard in the land.[5] Yet, the Commission has already determined that there is no difference in the cost of terminating calls to ISPs[6] and recently recognized that, in the real world, dial-up minutes are beginning an irreversible decline.[7] Recognizing this, the Commission removed its ill-advised and anti-competitive new market prohibition and its growth cap on ISP-bound minutes.[8]

Throughout this prolonged campaign, the RBOCs have always had the ability in the market to address their perceived harm: They could actually compete for the ISPs that CLECs serve. Further, it is quite likely that RBOCs have always terminated more ISP minutes than CLECs as a result of providing service to both their own captive ISPs, and ISPs that they provide service to as local exchange providers.

The Commission, in the recent *Core* decision, took a positive step in righting the punitive aspects of its interim ISP rules.[9] The RBOCs now seek to have the FCC change its rules and create still another category of intercarrier compensation – uncompensated ISP-bound calls

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2 *ISP Remand Order*, Docket 99-68, at ¶ 46 (Apr. 27, 2001).

3 It turns out that the Commission, in 1996, was extremely close to the correct rate.

4 Examples include decisions in Alabama, California, Connecticut, Florida, Illinois, Michigan, New Hampshire, Ohio, Oregon, Rhode Island, Texas, Wisconsin, and Washington.

5 Verizon *Ex Parte* at 1, 6 (Jan. 28, 2005).

6 *See, e.g., ISP Remand Order* at ¶ 90; *Petition of Core Communications Inc.*, WC Docket No. 03-171 (Oct. 18, 2003) at ¶ 24.

7 *Core Communications Inc.* at ¶ 20; *Ex Parte* letter from Richard M. Rindler, Swidler Berlin LLP, to Marlene H. Dortch, Secretary, WC Docket No. 03-1271, filed Jan. 11, 2005.

8 *Core Communications Inc.* at ¶ 24.

9 *Id.* at ¶¶ 20, 21.

served via VNXX service.[10] As the Commission issues its FNPRM on a unified theory of intercarrier compensation, it should not bend to RBOC pressure to move in the opposite direction by creating a new and artificial category of traffic.

As others have explained, RBOC claims that they are bearing excess transport costs for VNXX calls do not withstand the most cursory analysis.[11] Under the Act, calls from the RBOC are delivered to the CLEC at the CLEC POI regardless of the nature of the call. It is the CLEC's responsibility to get the call to its customer, wherever that customer is located. VNXX simply has no impact on RBOC costs.

We urge the Commission to take immediate action to put an end to the ILECs' efforts to once again stop payment for the termination of calls to ISPs. There simply is no basis for the Commission to change its policy at this juncture; it should, instead, reaffirm its ruling that ISP-bound calls – no matter how provisioned – trigger termination payments under the Commission's *ISP Remand Order*.

Sincerely,

Richard M. Rindler
Michael W. Fleming

cc: Scott Bergmann
Matt Brill
Jeff Carlisle
Victoria Goldberg
Dan Gonzalez
Jane Jackson
Christopher Libertelli
Jennifer Manner
Steve Morris
Tamara Preiss
Jessica Rosenworcel

[10] Qwest, for its part, does not want to change the rule as much as it wants to simply ignore it. *See* fn.2.

[11] PaeTec Communications, *Ex Parte*, Docket No. 99-68 (Jan. 24, 2005); US LEC Corp., RCN Telecom Services, Inc., Starpower Communications, Focal Communications, and Pac-West Telecomm, *Ex Parte*, Docket No. 99-68 at 4 (Oct. 28, 2003).

TAB 1

January 27, 2005

Daniel Melazis
Focal Communications
200 North LaSalle Street - Suite 1100
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dmeldazis@focal.com

TO:Daniel Melazis

Announcement Date:	**January 27, 2005**
Effective Date:	**Immediately**
Document Number:	**PROD.01.25.05.A.001303.LIS_LOCAL**
Notification Category:	**Product Notification**
Target Audience:	**CLEC**
Subject:	**VNXX on LIS Trunks**

Local Interconnection Service (LIS) trunks are to be used only for the mutual exchange of Exchange Service (Local), Exchange Access, and Jointly Provided Switched Access Services. Calls that originate in one local calling area and terminate to an end user located in another local calling area are not Exchange Service calls, regardless of the NPA-NXX used for those calls, and should properly be treated as long distance calls. Therefore, these types of calls should be rated using Qwest's Switched Access tariffs with appropriate provisioning of interexchange transport.

Qwest has become aware that Focal Communications is utilizing LIS trunking for the termination of inappropriate long distance traffic. This inappropriate use of LIS trunking is achieved by obtaining local NPA-NXXs and filing the NPA-NXXs in the Local Exchange Routing Guide (LERG), to give the appearance of a local dialing pattern for these intraLATA or interLATA toll calls. The industry now refers to this type of toll traffic as Virtual NXX (or "VNXX") traffic. **No interconnection agreement between Qwest and any party permits or requires the exchange of VNXX traffic, and LIS trunking should not be utilized for the exchange of VNXX traffic. This restriction includes Single Point of Presence (SPOP) LIS trunking arrangements.**

Please see the attached VNXX service example.

It is Focal Communications's responsibility to ensure that VNXX traffic is not exchanged via LIS trunking arrangements. To resolve any potential misuse of LIS trunking arrangements, Focal Communications can take the following step:

- You can modify your assignment of telephone numbers to your end-user customers to ensure that they are only receiving a phone number with an NXX assigned to the rate center where they are physically located. This would modify the dialing patterns (to 1+) for your current VNXX traffic and either migrate the traffic from LIS to tariffed Switched Access Feature Group D trunks for interLATA traffic or appropriately use the LIS trunking if the traffic is Exchange Access traffic.

By this letter, Qwest is initiating a dispute with Focal Communications pursuant to the dispute resolution provisions of Focal Communications's interconnection agreement with Qwest. Qwest requires that Focal Communications cease its use of VNXX architecture such that Qwest is forced to send VNXX traffic to Focal Communications. In addition, Qwest will be taking the following steps:

1. Cessation of payment of reciprocal compensation for VNXX traffic. Should Focal Communications dispute Qwest's findings with respect to the determination of VNXX traffic versus Exchange Service, Exchange Access or Jointly Provided Switched Access traffic, Qwest will, in good faith, work with Focal Communications to resolve that dispute;

2. Continuation of the Dispute Resolution process in Focal Communications's interconnection agreement with Qwest, including but not limited to filing complaints regarding this dispute with the appropriate state regulatory agency; and

3. Any other appropriate actions that Qwest may deem necessary to cease the exchange of VNXX traffic with Focal Communications and appropriately compensate Qwest for use of its facilities. Qwest does not waive and specifically reserves any claims, rights and actions it may have against Focal Communications regarding the exchange of VNXX traffic, including but not limited to seeking compensation for Focal Communications's use of Qwest facilities in exchanging this interexchange VNXX traffic.

Therefore, as discussed above, this letter serves to open the applicable dispute timeframes in Focal Communications's interconnection agreement with Qwest. Qwest must receive written confirmation no later than February 15, 2005, that Focal Communications has either ceased forcing Qwest to exchange VNXX traffic with Focal Communications or a specific date upon which Focal Communications will cease doing so. If Focal Communications fails to provide this written notice by February 15, 2005, to Dan Hult, Director, Carrier Relations, at dan.hult@qwest.com or at 1314 Douglas Street, Omaha, NE 68102, Qwest will continue to pursue all of the actions discussed above, including but not limited to filing of complaints with the appropriate regulatory agencies. It is necessary that Focal Communications and Qwest begin working immediately on a cooperative solution that follows the requirements of the interconnection agreement between Focal Communications and Qwest. Please work with Dan Hult as Qwest's initial contact for this dispute, who can be reached at dan.hult@qwest.com. Thank you in advance for your cooperation on this issue.

Best regards,

Steven Hansen
Vice President – Carrier Relations
Wholesale Markets
Qwest Services Corporation

Note: In cases of conflict between the changes implemented through this notification and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement.

The Qwest Wholesale Web Site provides a comprehensive catalog of detailed information on Qwest products and services including specific descriptions on doing business with Qwest. All information provided on the site describes current activities and process. Prior to any modifications to existing activities or processes described on the web site, wholesale customers will receive written notification announcing the upcoming change.

If you would like to unsubscribe to mailouts please go to the "Subscribe/Unsubscribe" web site and follow the unsubscribe instructions. The site is located at:

http://www.qwest.com/wholesale/notices/cnla/maillist.html

cc: Liz Stamp
Deb Hamer

Qwest Communications 1600 7th Ave Room 1806 Seattle WA 98008